Published November 14, 1894.

Supreme Court Syllabi

9908.

State of Kansas vs. C. W. Myers.

Appeal from Kiowa County.

REVERSED.

SYLLABUS. BY THE COURT. HORTON, C. J

1. Where a record is filed in this court, consisting of two volumes, marked one and two, purporting to contain the bill of exceptions in the case, certified to and authenticated by the trial judge, who states that the bill of exceptions is contained "in two volumes numbered one and two," in the absence of any proof to the contrary, such volumes will be considered as containing the bill of exceptions so referred to.

2. The case of Lauer vs. Livings, 24 Kas., 275, followed.

3. Where the complaint and warrant in a criminal case state in general language the offense charged against the defendant and such defendant waives a preliminary examination thereon, he cannot be heard, after an information has been filed, setting forth fully and specifically the offense attempted to be charged in the warrant, that he has had no preliminary examination.

4. An information, under the provisions of sec. 16, chap. 43, session laws of 1891, charging an officer of a bank with knowingly accepting deposits when his bank is insolvent, need not allege that loss occurred to any one by reason of such deposit.

5. In the prosecution of an officer of a bank for knowingly violating the provisions of sec. 16, chap 43, sess. laws of 1893, it is error to permit a witness upon the trial to give his opinion as to the solvency or insolvency of the bank at the time of the alleged deposit. The actual facts concerning the condition of the bank at the time of the deposit may be proved, but opinion evidence thereof is not admissible.

6. The law of the state does not require a bank, receiving deposits and transacting a banking business, to retain on hand all of the money of its depositors. The bank is not generally expected to be able to pay every depositor at once, but, if solvent, it must be able to pay or provide for its depositors and other debts as they are demanded in the usual course of business.

7. In a criminal prosecution, under sec. 16, chap. 43, sess. laws of 1889, against an officer of a bank for knowingly receiving deposits when his bank is insolvent, the capital stock and surplus fund are not to be considered as liabilities tending to show such insolvency. The capital and surplus of a bank are its resources which may be used to pay its depositors and other creditors, when there has been loss by loans or otherwise.

8. In a criminal prosecution under sec. 16, chap. 43, sess. laws of 1891, a person holding the office of director and vice president of the bank is not conclusively presumed to know everything of importance that occurs in the bank, including its condition, in the absence of actual notice or knowledge thereof.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

9860.

The State of Kansas vs. William Hickman.

Appeal from Dickinson County.

AFFIRMED.

SYLLABUS. BY THE COURT. HORTON, C. J

1. The record examined and the evidence held sufficient to sustain the verdict of the jury that the defendant made an unlawful sale of intoxicating liquor, as charged in the first count of the information filed against him.

2. In re Gilson, 34 Kas., 641, followed.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

9507.

John A. Doran, et al. vs. Oscar D. Barnes.

Error from Sedgwick County.

REVERSED.

SYLLABUS. BY THE COURT. HORTON, C. J

An action to enjoin the collection of an assessment, made by a city of the first-class in paving a street, must be commenced within thirty days from the time when the amount of the assessment is ascertained; if all the proceedings, prior to and including such assessment, purport to be regular and apparently confer full jurisdiction upon the mayor and city council to order the paving complained of. Sec. 590, gen. stat. of 1889; sec. 1, chap. 101 sess. laws of 1887; city of Topeka vs. Gage, 44 Kas. 87.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

9757.

The State of Kansas vs. Stub Crane.

Appeal from Rush County

REVERSED.

SYLLABUS. BY THE COURT. HORTON, C. J

1. An information for criminal conspiracy charged the defendant C. and his co-defendant G. with having obtained from one M. a promissory note for $150. On account of a lightning rod put up on M.'s house on the representation that it would cost $7.50 only. After the rodding was completed, M. was induced by C. to sign a written contract by which he obligated himself to pay $150. Subsequently, with full knowledge of all the facts, he executed the note of $150 to G. for the amount of the contract. *Held*, That the information and evidence offered in support thereof, were insufficient to support the conviction, when it was not averred in the information that M. was so ignorant that he could not read the contract, or that he was blind, or that he was shown one paper and by trick induced to sign another, and when it further appeared from the information and evidence that M. before signing the note had found out that G. was a fraud, and with full knowledge of all the facts, executed the note for the reason that G. stated to him, that he could make his defense to the note better than to the written contract.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

9584.

The State of Kansas vs. John D. Yeiter.

Appeal from Gray County.

REVERSED.

SYLLABUS. BY THE COURT. HORTON, C. J

1. Two offenses are charged in section 1, chap. 104, sess. laws of 1881, just as distinct as if they were covered by separate sections of the statue.

2. The second clause or offense of section 1, chap. 104, sess. laws of 1881, was intended to reach such agents as attorneys, collecting agents, etc., who collect money for their principals and to make their improper failure to pay on demand a crime. State vs. Bancroft, 22 Kas., 170.

3. The terms clerk and servant of a private person or of any copartnership used in section 1, chap. 104, sess. laws of 1881, (sec. 58, crimes act, gen. stat. of 1889) include the cashier of a partnership, operating a private bank not incorporated, when such cashier is employed at a monthly salary to transact the business of the firm, under its direction and control.

4. Where the defendant, being a clerk and servant, at a monthly salary, of a copartnership operating a private bank, and also being under the direct control of such partnership, is charged with embezzlement under the second clause of sec. 1, chap. 104 sess. laws of 1881, and it appears from the evidence that if guilty under chap. 104, it is under the provisions of the first clause of sec. 1 of said chapter, and not under the second clause and the information is not sufficient under the first clause, no conviction can be sustained.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

7281.

Charles Moran vs. Patrick Moran.

Error from Wyandotte County.

AFFIRMED.

SYLLABUS. BY THE COURT. HORTON, C. J

Where a tenant leases a dwelling house from his landlord, without any definite time being fixed for the expiration of the lease, and agrees to pay a specified sum per month, to be paid monthly and the tenant continues in possession of the premises for over two years, with the consent of his landlord, but fails to pay any rent, although frequently requested so to do, and his landlord then finally decides that he wants the possession of the premises and gives the tenant formal notice to quit, *Held*, That the action of unlawful detainer is not barred because of such possession by the tenant with the consent of the landlord for over two years.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

7212.

Leavenworth Lodge No. 2 of the Independent Order of Odd Fellows, et. al. vs. James L. Byers, et al.

Error from Leavenworth County.

AFFIRMED.

SYLLABUS. BY THE COURT. HORTON, C. J

1. Where the owner of a lot desiring to erect a building of certain dimensions thereon, enters into a written agreement with the owner of the adjoining lot, who has a three-story brick building already erected upon his lot, to use the east wall of such building for the joists of his proposed building and as a party wall, and in accordance with such agreement constructs a two-story brick building upon his own lot, extending the joists thereof into the east wall of the three-story brick building adjoining, and at the time of such written agreement between the adjoining lot owners, the three-story brick building and the lot upon which it stands is heavily mortgaged; and subsequently the mortgage is foreclosed, the adjoining lot owners being parties defendant in the action (and being duly served with summons, and by the foreclosure being barred of all the title, right and interest in and to the mortgaged property from and after the sale thereof,) the decree of foreclosure and the issuance of a sheriff's deed thereon, gives the purchaser all the title and interest of the defendants to the property, and such purchaser at the sheriff's sale becomes the sole owner of the lot upon which the three-story brick building stands, including the party wall and so much of the joists as were put into the east wall by the adjoining lot owner.

2. The general principle is that every owner of a lot, building or other real estate, has absolute dominion over his own property, but the right of an owner of a lot or building to take down or change any foundation, wall or other part thereof, without being answerable for the consequent injury to his neighbor's house or building, is subject to the qualification that he must exercise due care and skill and that he will be liable in damages, if the injury to his neighbor is occasioned by the negligent and unskillful manner in which the work is performed.

3. The filing of a cross-petition attached to a transcript or case-made previously filed in the supreme court to reverse or modify the judgment or final order of the trial court is the commencement of a proceeding in the court at the instance of the party filing the same, and such cross-petition must be filed in the supreme court within one year after the rendition of the judgment, or the making of the order complained of, unless the party is under disability.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

7235.

C. W. Winslow vs. Joseph Bromich, et al.

Error from Clark County.

REVERSED.

SYLLABUS. BY THE COURT. HORTON, C. J

A movable sugar wagon, constructed of sheet and cast iron, four feet long, three feet wide and twenty-six inches deep with three adjustable low wheels, about eight inches in diameter, used in a sugar mill for the purpose of holding syrup and conveying it from place to place by being pushed by hand not actually or constructively annexed to the realty, or to anything appurtenant thereto, but being placed in the mill for use only, and not to enhance the value of the realty, is personal property and not a fixture.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

7330.

T. McCarthy vs. A. H. Holden & Company.

Error from Pawnee County.

REVERSED.

SYLLABUS. BY THE COURT. HORTON, C. J

1. In order to effect a valid appeal from the judgment of a justice of the peace, the appellant must, within ten days from the rendition of the judgment, place in the hands of the justice, or in his office, a proper appeal bond. Bubb vs. Cain, 37 K. 692.

2. The filing of a bond or undertaking within ten days from the rendition of a judgment of a justice of the peace is a jurisdictional act and if no bond is filed within ten days no jurisdiction is conferred upon the appellate court. In a case where a bond is filed after the ten days from the rendition of the judgment has expired, the appeal is void and the bond worthless. The justice continues to have jurisdiction, and the case is not in the district court and that court has no jurisdiction thereof.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

9930.

In the Matter of the application of Nettie Snook for a Writ of Habeas Corpus.

Original Proceeding in Habeas Corpus.

APPLICATION DENIED.

SYLLABUS. BY THE COURT. JOHNSTON, J

In a habeas corpus proceedings by a mother, the father being dead, to obtain the custody of an infant child from its paternal grandparents who have had the care and possession of the child from infancy, the future welfare of such child is the paramount consideration; and under the evidence in this case it is *Held*, That the best interests of the child will not be subserved by removing her from the custody of the grandparents.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

9863.

The State of Kansas vs. Samuel Barr.

Appeal from Dickinson County.

AFFIRMED.

SYLLABUS. BY THE COURT. JOHNSTON, J

1. An objection to the verification of an information that it was not sworn to positively, but upon information and belief, should be taken advantage of upon a motion to quash the warrant before a recognizance for appearance at court is given or other steps taken which will operate as a waiver of the defect in the verification.

2. A finding of the trial court upon conflicting testimony as to a disputed question of fact raised upon a plea in abatement cannot be disturbed by the supreme court.

3. State vs. Looker, ante, ——, followed.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

9862.

The State of Kansas vs. Dink Looker (whose real name is unknown.)

Appeal from Dickinson County.

AFFIRMED.

SYLLABUS. BY THE COURT. JOHNSTON J

1. A charge in an information substantially in the language of the statute, that the defendant who not being "lawfully and in good faith engaged in the business of a druggist," did, at a certain time and place, sell intoxicating liquors, is sufficient.

2. The first count of the information, after the formal part, proceeds: "Now, therefore, I, Samuel S. Smith, county attorney of Dickinson county, in the state of Kansas, in the name and the authority of the state of Kansas, come now here and give the court to understand," etc., and the second and third counts, instead of giving the name and office of the county attorney as above set forth, proceeds: "And I further give the court to understand," etc. At the end of the information the county attorney attached his official signature and verification. *Held*, That the failure to give the name of the county attorney in the beginning of the second and third counts is not a substantial objection.

3. Chapter 129 of the laws of 1889, which purports to amend the law relating to the release of persons imprisoned for failure to pay fine and costs, and who are unable to pay the same, is unconstitutional and void.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL.] Clerk Supreme Court.

9618.

The Union Terminal Railroad Company vs The Board of Railroad Commissioners of the State of Kansas et al.

Error from Wyandotte County.

REVERSED.

SYLLABUS. BY THE COURT. JOHNSTON, J

1. In a proceeding to condemn a crossing for one railroad over another, under chapter 184 of the laws of 1887, the decision and award of the commissioners is final, unless an appeal is taken within the precribed time.

2. When a proper application is made in writing and a hearing is had thereon after due notice to the interested parties, and the commissioners determine that there is a necessity for a crossing, the place where it shall be made and the manner of such crossing, as well as the compensation to be awarded and the terms upon which it shall be made, their authority in the matter is at an end.

3. An attempt to reopen such a decision after the expiration of more than four months, and after one of the parties relying upon the conclusive character of the decision, has expended a large sum of money, and where it appears that the attempt to reopen and rehear will injuriously affect the crossing company, it is entitled to the remedy of injunction to prevent such reopening the case or any interference with the rights which it acquired under the decision.

4. Where a ruling is made refusing a temporary injunction in a case where some of the necessary parties are absent, the principle of *res adjudicata* will not apply to prevent a full hearing upon the merits either before the same or some other competent tribunal.

5. Where a defendant in its cross-petition asks for a temporary order to enjoin the performance of an act that has already been restrained by an order of the same court in another action between the same parties and which is still in force, the refusal of the additional order under the cross-petition cannot be regarded as an abuse of discretion.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

9766.

The Board of County Commissioners of Miami County, Kansas, vs. J. P. Hiner.

Error from Miami County.

AFFIRMED.

SYLLABUS. BY THE COURT. JOHNSTON, J

Chapter 80 of the laws of 1893, being an act fixing the fees and salaries of certain county officers of Miami county, and which provides that portions of the act shall go into effect and become a law at two different times, violates section 19 of article 2 of the constitution and is invalid.

Horton, C. J., concurring.
Allen, J., dissenting.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

7272.

The Wichita & Western Railroad Company, et al., vs, W. F. Thayer, et al.

Error from Kingman County.

REVERSED.

SYLLABUS. BY THE COURT. JOHNSTON, J

Condemnation proceedings for a right of way for a railroad which are regular and legal, and in which the reward made is deposited as the statute requires, vest a complete easement in the railroad company as against the owner and any mortgagees who may have liens upon the land from which the right of way is appropriated. Rld. Co. vs. Sheldon, 53 Kas. ——.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

9560.

The State of Kansas vs. Otto Miller

Appeal from Harper County.

REVERSED.

SYLLABUS. BY THE COURT. JOHNSTON, J

An action was begun in the United States circuit court in which a receiver was ap-